Filed
Dec. 15, 1972
John J. Parker, Clerk
By Elaine E. McGhee, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

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| UNITED STATES OF AMERICA ex rel HENRY F. COBELL, | ) | Civil No. 3123 |
| Petitioner, | ) | MEMORANDUM |
| -vs- | ) | OPINION, ORDER AND |
| JOAN R. COBELL and THE HONORABLE JUDGE JOHN SHARP and THE BLACKFEET TRIBAL COURT, and LEONA CONWAY, | ) | JUDGMENT |
| Respondents. | ) | |

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The respondents, Blackfeet Tribal Court and its Chief Judge, the Honorable John Sharp, have moved this court to reconsider and vacate its order of December 6, 1972. That order directed a

writ of habeas corpus to issue releasing the petitioner's minor children from the custody of the Blackfeet Tribal Court. The court has been informed by counsel that the other respondents join in this motion, though not formally, and that they will not be submitting separate memoranda, thus allowing expeditious consideration of the motion.

1. Respondents argued that the petitioner deliberately bypassed his Tribal Court remedies, and, as a consequence, that he is not entitled to a writ of habeas corpus.

By the order of December 6th this court found that petitioner had exhausted all remedies available to him in both the State and the Tribal Courts and thus satisfied the prerequisites for the issuance of the writ. The court is not

presently inclined to recant.

As noted in the previous order, Judge Sharp testified before this court that it was his intention not to rescind his order, that he had issued it for purposes of testing his jurisdiction, and that he did not expect it changed except by order of a Federal Court. From his testimony, it is the opinion of this court that the petitioner had no effective remedies available to him in Tribal Court. Whatever remedies may have existed were effectively curtailed by the entrance of the order which the court has heretofore held invalid. That remedies are available in theory, but not in fact, is not synonymous with failure to exhaust remedies. That ineffective and meaningless procedures were available to petitioner does not preclude his seeking a writ of

habeas corpus.

2. Next, respondents argue that the order of the Blackfeet Tribal Court was in the nature of a temporary restraining order, thus properly rendered after an ex parte procedure, and therefore not violative of due process.

Much of what is said above is equally applicable here. Although the order of the Blackfeet Tribal Court was in name temporary, the Judge who issued it expressed his intent not to modify that order.

Furthermore, the order, on its face, does not reflect that its continued enforcement is conditional upon some conduct of the petitioner. Rather, it is expressly conditioned upon the satisfaction of the Tribal Court with some future custodial order of a Montana District

Court. The order stated that it was to be in effect until the Tribal Court was satisfied with a modification of the State Court custody decree. The petitioner had done all that could be done in that regard. He had received from the District Court as final a custody order as is possible. That order represented a finding by the State District Court that the father was the proper custodial parent, and that awarding the minor children to his custody was in the best interests of those children. For the Tribal Court to condition its order on modification of the State Court's fresh custodial order is not an act susceptible to the label of temporary.

3. Respondents next attack what they call this court's implicit finding that the real reason behind the Tribal Court's

order was the creation of a "sanctuary" for Indian persons. Respondents argue this to be an unwarranted finding, not supported by any evidence.

In its order, this court noted that the Tribal Court's order was, by expression, made for the protection and well-being of the minor children, but found that its tenor reflected another end. The respondents take the court's conclusion as inferring that the Tribal Court acted with bad purpose in issuing the order. This court condemned the effect of the Tribal Court's order. The use of the term "tenor" does not reflect an attempt by this court to read a purpose into the order in question. Rather, it was employed as a description of the effect of the order or the trend which the order reflected. This court does not doubt the

experience reflected in the affidavit filed with the motion. Nor does it doubt that Judge Sharp proceeds in good faith in instances when his office is called upon to interact with state law enforcement officials. This court does not condemn the practices of the Tribal Court; it is only the effect of its order which this court finds to invalidate its issuance.

4. Respondents conclude that this court has made an erroneous assumption regarding the extent of Tribal Government authority without specific grant by Congress. The court recognizes that Tribes possess such power as not limited by Congress. But that principle is not that upon which this court predicated its decision. When the court noted that it could find no controlling Federal

legislation which would justify the order of the Tribal Court, this court was not assuming that an Indian Tribe requires a grant of power by Congress to act regarding matters essential to Tribal self-government. It is clear from Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959), that " . . . the Indian Tribes retain exclusive jurisdiction over essential matters of Reservation government in the absence of specific Congressional limitation, . . . ." State of Arizona ex rel. Merrill v. Turtle, 413 F.2d 683, 684 (9th Cir. 1969). But we do not here deal with matters within the exclusive jurisdiction of Indian Tribes for we do not deal with matters which are essential to Reservation government. Instead, we are in an area where a Tribe has acted in disregard of the powers of a

sovereign state. By doing so, the Tribe erects a barrier between it and the sovereign state. It is the belief of this court that before a Tribe of Indians may so interfere with the powers of the sovereign government of any state, it needs a Congressional grant of authority. Finding no such grant, I find the order of the Tribal Court in this case to be invalid.

5. Finally, the respondents argue that the state court lacks subject matter jurisdiction of enrolled members of the Blackfeet Tribe who are temporarily residing off the Reservation. This is the first time the issue of state court jurisdiction to grant the divorce and custody decree has been raised. In the December 6th order, after noting that no party had contested the jurisdiction of the state courts in this regard, the court

noted that it could find no impediments to the assumption of that jurisdiction. I find no impediment now.

Respondents argue that there can be no jurisdiction of Indian persons temporarily residing off the Reservation. It is interesting to note that the marriage ceremony dissolved by the Montana divorce decree was performed in Canada, off the Reservation; that the petitioner and one of the respondents invoked the jurisdiction of the Montana Court while off the Reservation; and that the petitioner still resides off the Reservation. The logical end of the argument here made by the respondents is that whenever an Indian person, be he a Tribal member or not, resides off the Reservation, that residence is necessarily perpetually temporary, for the Indian person could at

any time return to the Reservation. While this court is unwilling to draw a fine line, suffice it to say that where an Indian person has assumed a residence off an Indian reservation, and, otherwise qualifying, invokes the jurisdiction of the District Court, he cannot defeat that jurisdiction by informing the court he is an Indian person, temporarily residing off the Reservation.

Therefore, the court, being fully apprised and advised in the matter, and, having by an Order dated the 6th day of December, 1972, granted the petition for writ of habeas corpus directing the return of the two minor children to the petitioner and custodial parent under the District Court order of the State of Montana,

IT IS THEREFORE ORDERED AND

ADJUDGED that the writ of habeas corpus in favor of the petitioner be granted.

IT IS FURTHER ORDERED AND ADJUDGED that by granting of the writ of habeas corpus petition, that the minor children be returned to the petitioner and custodial parent.

IS IS HEREBY FURTHER ORDERED AND ADJUDGED that the Tribal Judge release the two minor children, Rodney Dale Cobell and Venetta Lynn Cobell, and deliver them to the custody of the petitioner herein, at the end of seven (7) days from the date of this order. The court, having been informed that an appeal will be taken from this judgment, believes it to be in the best interests of the children to stay this judgment for that period, thus allowing the Circuit Court to determine whether it is appropriate to continue the

stay of this judgment pending determination of the merits of the appeal.

IT IS HEREBY FURTHER ORDERED AND ADJUDGED that petitioner recover from the respondents his costs expended in this cause, to be fixed and taxed by the Clerk of the Court, pursuant to Rule 17(a) of this Court.

Done and dated this 15th day of December, 1972.

JAMES H. BATTIN
United States District
Judge